Supreme Court, U.S.
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98 759 NOV 6 1998
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CITY OF CHICAGO,
Petitioner,
v.
MIKE YANG,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED

Whether a federal district court has jurisdiction, after it has entered final judgment on a claim within its jurisdiction, to adjudicate a motion seeking to collect that judgment from a third party that does not hold funds or other property belonging to the judgment debtor.

PARTIES TO THE PROCEEDING

The petitioner is the City of Chicago. The respondent is Mike Yang.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-11a, is reported at 137 F.3d 522. The district court's order, App., *infra*, at 12a, and oral decision, *id.* at 13a-23a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1998. A timely petition for rehearing was denied on June 9, 1998. On September 2, 1998, the time

to file this petition for a writ of certiorari was extended to November 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367(a) provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Federal Rule of Civil Procedure 69(a) provides, in pertinent part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Federal Rule of Civil Procedure 82 provides, in pertinent part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . .

STATEMENT

Respondent Mike Yang ("Yang") brought this action against the City of Chicago and two of its police officers, Kenneth Brown ("Brown") and Paul J. Hardin ("Hardin"). See *Yang v. Hardin*, 37 F.3d 282, 284 (7th Cir. 1994) (*"Yang I"*). His action was based on events occurring at his shoe store on January 18, 1991. That day a burglar alarm went off at the store. App., *infra*, at 2a. When Yang arrived at the store, Brown and Hardin, on duty and in uniform, were already there. *Ibid.* After Brown and Hardin had completed their investigation and were preparing to leave, Yang noticed a bulge in Brown's jacket and accused him of shoplifting. *Ibid.* After denying that he had any merchandise, Brown pulled a pair of shorts from his jacket and threw them at Yang. *Id.* at 2a-3a.

Brown and Hardin then got into their squad car, with Brown behind the wheel. App., *infra*, at 3a. Yang tried to prevent them from driving away by holding the door on Brown's side open and, at the same time, asked Hardin to radio the sergeant so that Brown could be arrested. *Ibid.* With Yang still hanging onto the door, Brown nevertheless drove off, speeding in a zigzagging pattern in an effort to throw Yang off. *Ibid.* Yang's brother chased the car on foot. *Ibid.* When two bystanders ran into the street, Brown halted the squad car, and Yang was able to jump off. *Ibid.* Brown got out of the car and punched both Yang and his brother, knocking them down. *Ibid.* Hardin also got out, shouted obscenities, and pointed his gun at the Yangs. *Ibid.* Brown and Hardin then drove away in the squad car. *Id.* at 4a.

As a result of this incident, Hardin was terminated from the Chicago police force, and Brown was suspended

indefinitely. R. 24 at 6. In addition, both men were convicted of felonies in connection with the incident—Brown pled guilty to a charge of official misconduct; Hardin was tried and found guilty of theft, official misconduct, and aggravated assault. *Yang I*, 37 F.3d at 284.

Yang's amended complaint included counts seeking recovery against the City and both officers under 42 U.S.C. § 1983 for alleged violations of the Fifth and Fourteenth Amendments to the United States Constitution, R. 24 at 1-11, as well as counts seeking recovery against the officers alone under state law. *Id.* at 11-13. Because the section 1983 counts purported to allege civil rights claims involving a federal question, the district court had jurisdiction over them under 28 U.S.C. §§ 1331 and 1343. The district court had supplemental jurisdiction over the state-law counts against the officers under 28 U.S.C. § 1367. Brown and Hardin both defaulted. App., *infra*, at 4a. The district court dismissed the action against the City, relying on *Monell v. Department of Social Services*, 436 U.S. 658 (1978), then entered a judgment of $229,658.10 against Brown but not against Hardin. App., *infra*, at 4a. Yang appealed to the Seventh Circuit, challenging only the judgment for Hardin. See *Yang I*, 37 F.3d at 283. That court reversed and remanded the case to the district court with instructions to enter a judgment for Yang against Hardin. See *id.* at 287. On February 14, 1995, the district court entered a judgment against Hardin for $185,658.10. App., *infra*, at 4a.

Two and one-half months later—in May 1995—Yang filed a petition in the district court seeking entry of a judgment against the City for the amount of the judgment against either Brown or Hardin. App., *infra*, at 4a; R. 108. The petition cited the post-judgment relief provisions of Fed. R. Civ P. 69 and relied on section 9-102 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act, which provides:

> A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article.

745 ILCS para. 10/9-102 (1996). The district court dismissed Yang's post-judgment petition for lack of jurisdiction, relying on *Peacock v. Thomas,* 516 U.S. 349 (1996). App., *infra,* at 5a, 12a, 20a. The court also dismissed a petition for attorney's fees that Yang had filed. *Id.* at 5a, 20a-21a.

The Seventh Circuit reversed those judgments as well. App., *infra,* at 1a-11a. The court acknowledged *Peacock*'s holding that federal courts do not possess ancillary jurisdiction over "new actions" in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment. *Id.* at 7a-8a. The Seventh Circuit read this holding to allow a motion under Fed. R. Civ. P. 69 in the original lawsuit, even when a separate lawsuit would be barred. See *id.* at 8a-9a. Specifically, the court held that a post-judgment proceeding brought in the original suit under Rule 69 "to collect a judgment from a third person not a party to the original suit is within the court's ancillary jurisdiction, providing 'the additional proceeding does not inject so many new issues that it is functionally a separate case.' " *Id.*, at 9a (quoting *Wilson v. City of Chicago,* 120 F.3d 681, 684 (7th Cir. 1997)). Moreover, the court concluded, ancillary jurisdiction over a Rule 69 proceeding is not limited to cases in which the third party holds funds or other property belonging to the judgment debtors that the plaintiff seeks to obtain through garnishment or some similar procedure. See *id.* at 7a-8a n.1. Rather, according to the court, a Rule 69 proceeding is within the ancillary jurisdiction of the federal courts if it is based on the plaintiff's contention that the third party is required to pay the judgment directly to the

plaintiff on some independent state-law ground, such as section 9-102 of the Illinois Tort Immunity Act. See *id.* at 7a-9a & n.1.[1]

REASONS FOR GRANTING THE PETITION

In *Peacock v. Thomas*, 516 U.S. 329 (1996), the Court granted certiorari to resolve a conflict in the circuits over the scope of federal jurisdiction to enforce judgments against someone other than the judgment debtor. But the holding in that case, most likely because some language in the Court's opinion appears to confine the holding to the precise facts presented, has failed to eliminate the confusion in the lower courts on this important question of federal jurisdiction. Indeed, the First Circuit has recently observed that the circuits are applying *Peacock* "differently," and urged this Court to revisit the issue. See *Futura Development of Puerto Rico, Inc. v. Estado Libre Asociado de Puerto Rico*, 144 F.3d 7, 14 (1st Cir.), cert. denied, 67 U.S.L.W. 357 (U.S. Oct. 13, 1998) (No. 98-229).

As the decision below indicates, since *Peacock* the Seventh Circuit has hewed to its position that federal courts have jurisdiction to enforce judgments against third parties not holding assets of the judgment debtor as long as the plaintiff can identify some state-law theory that obligates the third party to pay the judgment directly to the plaintiff. The Seventh Circuit's position is that a post-judgment proceeding, if brought as a Rule 69 motion

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[1] On the merits, the court first considered the scope-of-employment requirement of section 9-102 and, without citing any Illinois cases addressing that issue of state law, concluded that Hardin was acting within the scope of his employment as a police officer when he injured Yang. See App., *infra*, at 10a. The court also rejected the City's contention that its home rule powers exempt it from section 9-102. See *id.* at 10a-11a. Based on these conclusions, the court held that the City is "derivatively liable" under section 9-102 for the default judgment that Yang obtained against Hardin. *Id.* at 11a.

in the same suit in which the judgment was rendered, is within federal jurisdiction "providing 'the additional proceeding does not inject so many new issues that it is functionally a separate proceeding.' " App., *infra*, at 9a. That position is not only far too imprecise to provide useful jurisdictional guidance, and inconsistent with the decisions of three other circuits, but it also ignores the basic principle that a federal rule of procedure cannot expand the scope of federal jurisdiction. Thus, the long-standing rule affirmed by *Peacock*—that post-judgment enforcement jurisdiction is limited to proceedings seeking to execute on the property of the judgment debtor—bars all other enforcement proceedings, regardless of whether they are filed as a separate lawsuit or instead as a Rule 69 motion in the original lawsuit.

This case presents a particularly good opportunity to clarify the scope of post-judgment jurisdiction because it arises in a recurring setting—proceedings brought under state law to compel a public employer to pay a judgment rendered against its employee based on allegations that the conduct giving rise to the judgment occurred within the scope of the judgment debtor's employment. This issue arises frequently in civil rights litigation, since, without such a state-law obligation, a public employer is not liable for the constitutional torts of its employees simply on the basis that they occurred within the scope of employment. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Thus, civil rights plaintiffs frequently have incentives to identify some basis in state law that obligates local governments to satisfy judgments obtained against their employees. Moreover, such state statutes are common. Litigants should receive clear guidance now about whether such litigation belongs in state or federal court, to avoid both the procedural confusion and waste of public and judicial resources until this Court ultimately rules, as we believe it will, that this kind of litigation belongs in state courts. Thus, plenary review is fully warranted here.

1. In *Peacock* the Court specifically noted that its purpose for granting certiorari was to resolve a conflict among the circuits on the scope of federal ancillary jurisdiction. See 516 U.S. at 352 & n.2. Of the six decisions that the Court identified as reflecting this conflict in the circuits, four had held that federal jurisdiction encompasses a proceeding in which a judgment creditor seeks payment of an existing judgment from a third party based on a state-law theory under which the third party could be liable for the judgment even if it holds no funds or other property belonging to any judgment debtor. See *Thomas v. Peacock*, 39 F.3d 493, 500-02 (4th Cir. 1994) (veil-piercing theory), rev'd, 516 U.S. 349 (1996); *Argento v. Village of Melrose Park*, 838 F.2d 1483, 1487-90 (7th Cir. 1988) (municipal liability for a constitutional tort of a public employee based on section 9-102 of the Illinois Tort Immunity Act); *Skevofilax v. Quigley*, 810 F.2d 378, 385-88 (3d Cir.) (en banc) (collective bargaining agreement requiring municipality to pay judgments against police officers arising out of performance of their duties), cert. denied, 481 U.S. 1029 (1987); *Blackburn Truck Lines, Inc. v. Francis*, 723 F.2d 730, 732-33 (9th Cir. 1984) (alter ego theory). The other two decisions had held that there is no jurisdiction over such a proceeding. See *Sandlin v. Corporate Interiors, Inc.*, 972 F.2d 1212, 1217-18 (10th Cir. 1992) (alter ego theory and tort of outrageous conduct); *Berry v. McLemore*, 795 F.2d 452, 455-56 (5th Cir. 1986) (oral promise by municipality to pay civil rights judgment against police officer).

Peacock held that federal courts lack ancillary jurisdiction over a proceeding, initiated after all other claims in the case have been resolved, in which a judgment creditor seeks payment of an existing judgment from a third party based on a state-law theory under which the third party need not hold property belonging to a judgment debtor. See 516 U.S. at 357-59. Thus, as the First Circuit recently observed, *Peacock* appears to have en-

dorsed *Sandlin* and *Berry* while repudiating *Argento*, *Skevofilax*, and *Francis*. See *Futura Development*, 144 F.3d at 11.

The Seventh Circuit, however, does not agree with the First Circuit that *Peacock* resolved the circuit split that way. That court reads *Peacock* to apply only to enforcement proceedings brought as a separate lawsuit and not to those brought in the original lawsuit under Rule 69. On this basis, the Seventh Circuit has twice declared that its decision in *Argento* was not "on the wrong side" of the circuit conflict that *Peacock* identified and, thus, was not repudiated by *Peacock*. App., *infra*, at 8a-9a; *Wilson*, 120 F.3d at 684 ("we now hold that the *Argento* line of cases survives" *Peacock*). Under the explicit holding in this case, federal courts can exercise jurisdiction over a proceeding brought by a judgment creditor to impose an obligation to pay an existing judgment on a third party, even when the proceeding is not initiated until all other claims in the case have been resolved and is premised on a state-law theory under which the third party need not hold any property belonging to a judgment debtor. App., *infra*, at 8a-9a. The court recognized only one limitation on this rule—where the post-judgment proceeding "injects so many new issues that it is functionally a separate case." *Id.* at 9a.

The conflict between the Seventh Circuit's holding in this case and the holdings of *Berry* and *Sandlin* could not be starker. While both *Berry* and *Sandlin* hold that federal jurisdiction is lacking when a plaintiff attempts to enforce a federal judgment against a third party not holding executable property of the judgment debtor on the basis of a state-law theory requiring that party to pay the judgment itself, the decision below, like the Seventh Circuit's prior *Argento* holding, reaches the opposite conclusion. Indeed, *Berry* and the decision below are virtually indistinguishable on their facts as well—both cases involved federal judgments obtained against police officers, and in both cases the plaintiff attempted to use state-law

theories to enforce the judgment against the municipality that employed the officer.

In fact, the only distinction between *Berry* and this case is that the post-judgment proceedings in *Berry* were brought as a separate lawsuit, whereas they were brought in this case (and in *Argento*) as a Rule 69 motion in the original lawsuit—a distinction the Seventh Circuit considers determinative. But that distinction does not eliminate the conflict in the circuits, as the holding in *Sandlin* makes clear. In *Sandlin* the plaintiff proceeded by way of both a new lawsuit and a Rule 69 motion in the original lawsuit, and the court held that neither effort to enforce the judgment against a third party on the basis of state law was within federal jurisdiction. That is because, as Rule 82 provides, the Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ." Fed. R. Civ. P. 82; see also *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) ("it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction"). As the Tenth Circuit observed in *Sandlin*, "Rule 69 creates a procedural mechanism for exercising postjudgment enforcement when ancillary jurisdiction exists, but cannot extend the scope of that jurisdiction." 972 F.2d at 1215 (citations omitted). Accordingly, if a new lawsuit would be jurisdictionally barred, then a Rule 69 motion in the original lawsuit is barred as well. For this reason, *Sandlin* and the decision below would be in conflict even on the Seventh Circuit's view of *Peacock*. And that view is also in conflict with the Federal Circuit's reading of *Peacock*. That court held in *National Presto Industries, Inc. v. Dazey Corp.*, 107 F.3d 1576 (Fed. Cir. 1997), that enforcement jurisdiction did not reach a motion filed in the original lawsuit seeking to expand the obligations imposed by a final judgment, since such jurisdiction was limited to enforcement of the terms of the judgment already entered. See *id.* at 1581-82.

Accordingly, in determining whether a post-judgment proceeding to collect a judgment falls within ancillary jurisdiction, it is the law in at least the Tenth and the Federal Circuits that an effort to use state law to impose an obligation not found in the terms of the judgment previously entered is jurisdictionally barred even if that effort is made as a Rule 69 proceeding in the original lawsuit. The law in the Seventh Circuit, however, is to the contrary because the Seventh Circuit has refused to abandon its adherence to *Argento*. And the Fifth Circuit presumably will continue to follow *Berry*, since that decision was endorsed in *Peacock*. Regrettably, the circuit conflict persists; *Peacock* failed to resolve it.

The First Circuit recently pointed out the Seventh Circuit's confusion in this area and observed that the "circuit courts are applying [*Peacock*] differently." *Futura Develoment*, 144 F.3d at 14. On this basis, the court invited "the Supreme Court's attention" to these issues of ancillary jurisdiction. *Ibid.* As we now explain, the rule we urge is correct, and the context in which these issues arise in this case makes it an excellent vehicle to ensure that the conflict will finally be resolved.

2. As this Court recognized in *Peacock*, there are two categories of ancillary jurisdiction—one, sometimes called pendent jurisdiction, that "permit[s] disposition by a single court of claims that are . . . factually interdependent"; the other, frequently called enforcement jurisdiction, that "enable[s] a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Peacock*, 516 U.S. at 354 (quoting *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 379-80 (1994)). The post-judgment proceeding brought by Yang does not fall within either category.

As is ordinarily the case, Yang initiated his post-judgment proceeding after all other claims in the case were resolved by the judgment. Such a post-judgment proceeding cannot fall within the pendent jurisdiction category.

Peacock recognized this with respect to judgment-collection proceedings like the one in that case—ones that are brought as a separate lawsuit. See 516 U.S. at 355 (holding that "once judgment was entered in the original ERISA suit, the ability to resolve simultaneously factually intertwined issues vanished"). And, as we explain above, this principle applies equally to a proceeding, like Yang's, that is brought as a motion under Rule 69 in the original lawsuit after all other claims have been resolved. In such a proceeding, just as in a post-judgment proceeding brought as a new lawsuit, there are no live claims to which the post-judgment claims can be pendent, since all pre-existing claims were resolved by the judgment. See *National Presto Industries*, 107 F.3d at 1581 (construing *Peacock* as holding that "once the original federal dispute is dismissed, claims that at one time might have been brought as 'ancillary' to that dispute may no longer be brought"). Moreover, because Rule 69 does not confer jurisdiction on a district court that would not otherwise exist, relabeling a jurisdictionally barred proceeding as a Rule 69 motion cannot expand the jurisdictional limits.

It is thus the other type of ancillary jurisdiction—enforcement jurisdiction—that ordinarily must exist if a litigant is to obtain the assistance of a federal court in collecting a judgment after its entry. As *Peacock* observed, federal courts possess ancillary jurisdiction to enforce the judgments they enter because, "without [it], . . . 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" 516 U.S. at 356 (quoting *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1868)). Thus, *Peacock* emphasized, "[a]ncillary enforcement jurisdiction is, at its core, a creature of necessity." 516 U.S. at 359. And, according to the Court, the only judgment-enforcement proceedings involving strangers to the judgment that are within ancillary jurisdiction are those that are essential to the functioning of federal courts because they guarantee that a federal judgment can be executed

against the judgment debtor's property—those proceedings by which a judgment creditor can "attempt to execute, or to guarantee eventual executability of, a federal judgment," *id.* at 357, "including, attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances," *id.* at 356. Indeed, *Peacock* confirmed that previous decisions of the Court had not "authorize[d] the shifting of liability for payment of the judgment from the judgment debtor to [third parties], as [the plaintiff] attempt[ed] to do" in *Peacock*. *Id.* at 358. These principles are consistent with the ordinary understanding that "[a] writ of execution is an order issued by a court, in the form of a final process designed to enforce a money judgment, directing an officer of the court to seize the property of a judgment debtor and transfer the proceeds over to the judgment creditor." 13 James W. Moore, et al., Moore's Federal Practice § 69.02 (3d ed. 1998); see also Black's Law Dictionary 568 (6th ed. 1990) (writ is a "[f]orm of process whereby an official (usually a sheriff) is directed by way of an appropriate judicial writ to seize and sell so much of the debtor's nonexempt property as is necessary to satisfy a judgment").[2]

In this case, Yang's post-judgment proceeding requested no writ of execution against anyone but, rather, sought precisely what *Peacock* said the Court had never allowed —to shift liability from the judgment debtor to a third party. As the district court correctly recognized in dismissing Yang's proceeding for lack of jurisdiction, the proceeding did not seek any funds or other property belonging to either judgment debtor in this case. See App.,

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[2] In *Sandlin*, the court recognized just this point. The Rule 69 motion in the original lawsuit presented a theory in addition to those that the court held to be jurisdictionally barred—that certain third parties were successors of Sandlin's employer that received transfers of, and hence were holding, the employer's assets. See 972 F.2d at 1218. The court held that this theory fell within ancillary jurisdiction, see *ibid.*, thereby identifying clearly where the jurisdictional line should be drawn.

infra, at 16a; see also *id.* at 7a-8a n.1. Instead, Yang's post-judgment proceeding sought a judgment against the City, a third party to the action, for the amount of the judgment Yang had obtained against Hardin or Brown, the judgment debtors.[3]

Our view of the proper scope of ancillary jurisdiction does not leave Yang without a remedy. Section 9-102 of the Tort Immunity Act, on which Yang relied in the district court, would authorize a state-court judgment in favor of Yang against the City if his judgment against Brown or Hardin were based on acts occurring within the scope of their employment. See 745 ILCS para. 10/9-102 (1996). But he could not pursue that relief in federal court because it was not within the district court's limited ancillary enforcement jurisdiction. The Seventh Circuit erred in holding otherwise.

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[3] The Seventh Circuit acknowledged our position that "there really isn't a garnishment at issue here since the City is not holding any funds belonging to Hardin and has no obligation under § 9-102 to pay either Brown or Hardin any amount." App., *infra*, at 7a-8a n.1. But the court declined to grapple with that contention, finding it "irrelevant, given [the court's] findings . . . that the City does have an obligation to pay Yang's judgment under § 9-102." *Ibid.* In view of its refusal to decide our contention, the court's repeated characterizations of section 9-102 as a "garnishment" or "indemnification" provision, *id.* at 2a, 4a, 9a, and of the post-judgment proceeding brought by Yang as one seeking "garnishment" or "indemnification," *id.* at 2a, 4a, 5a, 6a, 11a, are misleading. Indeed, a different Illinois statute authorizes municipalities to indemnify police officers for their torts, see 65 ILCS para. 5/1-4-5 (1996); but even Yang did not rely on that provision. It does not apply where, as here, "the injury results from the wilful misconduct of the police officer." *Ibid.* Here, the City would have no obligation to indemnify Brown or Hardin, who were convicted of felonies for injuring Yang. See *Yang I*, 37 F.3d at 284. And, in any event, liability under section 1-4-5, like section 9-102, does not involve enforcement of a judgment previously entered but requires additional findings. Section 1-4-5 turns on findings that the officer was "engaged in the performance of his or her duties" and that the injured person was not contributorily negligent. 65 ILCS para. 5/1-4-5 (1996). Section 9-102 requires a finding that the officer was acting within the scope of his employment. See 745 ILCS para. 10/9-102 (1996).

3. This case is a particularly good vehicle for resolving these jurisdictional issues, since it presents them in a context that arises often. Section 9-102 of the Illinois Tort Immunity Act is among the numerous state statutes that obligate local governments to pay a judgment obtained against an employee when that employee was acting within the scope of his employment.[4] Under *Monell* and its progeny, of course, a federal civil rights judgment cannot be entered against a municipality merely because its employee committed a constitutional tort within the scope of employment. Accordingly, such statutes are frequently the only means by which a plaintiff can recover from a municipality on a judgment entered against its employee for a constitutional tort. But these statutes require the plaintiff to prove that the tort was committed within the scope of employment; and litigating that issue can be—and frequently is—difficult. Illinois case law is typical. Illinois follows the Second Restatement of Agency

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[4] These statutes, which require local governments to pay such judgments directly to the plaintiff rather than to indemnify or reimburse their employee for the amount of the judgment, include Ark. Code Ann. § 21-9-304 (Michie 1996); Cal. Gov. Code § 825 (West 1995 & Supp. 1998); Colo. Rev. Stat. Ann. § 24-10-110 (West 1998); Conn. Gen. Stat. Ann. § 7-465 (West 1989 & Supp. 1998); Idaho Code § 6-903 (1990 & Supp. 1997); Kan. Stat. Ann. § 75-6116 (1997); Md. Code Ann., Courts and Judicial Proceedings, § 5-303 (1995 & Supp. 1997); Minn. Stat. Ann. § 3.736 (West 1997); Miss. Code Ann. § 11-46-7 (1972 & 1998 Supp.); Mont. Code Ann. § 2-9-305 (1997); N.J. Stat. Ann. § 59:10-2 (West 1992 & 1998 Supp.); Ohio Rev. Code Ann. § 9.87 (West 1994 & Supp. 1998); Okla. Stat. Ann. tit. 51, § 162 (West 1988 & 1998 Supp.); S.C. Code Ann. § 1-11-460 (Law. Co-op. 1997 Supp.); Utah Code Ann. § 63-30-36 (1997); V.I. Code Ann. tit. 33, § 3414 (1994 & Supp. 1998); Wash. Rev. Code Ann. §§ 36.100.150, 36.102.160, 42.52.460, 53.08.208, 87.03.158 (West 1998 Supp.); Wis. Stat. Ann. § 895.46 (West 1997); and Wyo. Stat. Ann. § 1-39-104 (Michie 1998 Supp.). Many states also have indemnity statutes that similarly "mimic respondeat superior by authorizing indemnification of employees found liable under § 1983 for actions within the scope of their employment." *Board of County Commissioners v. Brown*, 117 S. Ct. 1382, 1424 (1997) (Breyer, J., dissenting).

under which conduct of an employee, even while on duty, is considered outside the scope of employment "if it is different in kind from that authorized, . . . or too little actuated by a purpose to serve the master." *Wright v. City of Danville,* 675 N.E.2d 110, 118 (Ill. 1996) (citing Restatement (Second) of Agency § 228(2) (1958)); *Pyne v. Witmer,* 543 N.E.2d 1304, 1308 (Ill. 1989) (same). Thus, it is the law in Illinois that an employer is not responsible for "[s]erious crimes . . . [where] they are different in nature from what employees in a lawful occupation are expected to do." *Wright,* 675 N.E.2d at 118; see also *id.* at 119 (citing *Powers v. Union City Board of Education,* 308 A.2d 71, 75 (N.J. 1973), for its conclusion that "criminal misconduct originating out of performance of duties was not [an] act occurring within the scope of those duties"). Nor is an employer liable "for the criminal acts of its employees if the act is not committed in furtherance of the employer's business, but rather in furtherance of the employee's purposes." *Williams v. Hall,* 681 N.E.2d 1037, 1039 (Ill. App. 1997).

In cases of serious police misconduct, as in this case and several others that we cite, such a test can give rise to prolonged litigation in federal court at what is supposed to be just the enforcement stage of the case. Such litigation, of course, will be unnecessary if the Court rejects the jurisdictional holding below. But because the Seventh Circuit has refused to abandon *Argento,* it continues to decide these difficult questions of state law. Compounding this problem, the Seventh Circuit has taken to citing only its own decisions in place of Illinois law on scope of employment issues. See App., *infra,* at 10a. And, of course, once it becomes clear that the law in federal courts on scope of employment is more favorable to plaintiffs than any decided precedent of the state courts, plaintiffs can be expected to bring all such issues to federal

court.[5] The law in state and federal court will further diverge, and the transfer of authority from state courts to federal courts will be complete.

This result is contrary not only to *Peacock*, as we explain above, but also to the regime envisioned by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). And however unavoidable it is in our federal system to have some discrepancy in state law as pronounced by state courts or by federal courts, this is an area where a sensible jurisdictional rule can ensure that there is none. That, of course, is a further reason to adopt the reading of *Peacock* that we propose but the Seventh Circuit has rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] As should be clear from the discussion of Illinois law we set out above, the Seventh Circuit seriously erred in concluding that the theft and abuse of Yang were within the scope of employment of Chicago police officers. Under state law as pronounced by the Illinois courts, such criminal conduct is not within the scope of employment, even if undertaken as part of an officer's duties. See, *e.g.*, *Wright*, 675 N.E.2d at 118-19.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 97-1288 & 97-1418

MIKE YANG,
Plaintiff-Appellent,
v.

CITY OF CHICAGO,
Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 0054—John F. Grady, *Judge*

ARGUED JANUARY 12, 1998—DECIDED FEBRUARY 25, 1998

Before BAUER, COFFEY, and KANNE, *Circuit Judges.*

BAUER, *Circuit Judge.* This case began in 1991 when Mike Yang's south side shoe store was robbed. Two Chicago police officers responded to the call, but rather than help Yang, they violated his civil rights by committing numerous felonies against him. On this, his second, appeal to this court, Yang seeks to enforce a § 1983 judgment against both officers. *See Yang v. Hardin,* 37 F.3d 282 (7th Cir. 1994) (reversing district court's finding that Officer Hardin was not liable for § 1983 and state common law claims). Yang seeks to enforce his $229,658.10

judgment against the officers through a supplemental collection proceeding under Federal Rule of Civil Procedure 69(a) to have the City indemnify his § 1983 judgment in accordance with 745 ILCS 10/9-102. The district court dismissed Yang's garnishment proceeding for lack of jurisdiction. We reverse.

BACKGROUND

A. *Facts*

The following facts are taken from the factual background section of our first opinion in this case.

> On January 8, 1991, at approximately 11:00 p.m., Mike Yang, co-owner of a south-side shoe store, received a call from his alarm company notifying him that the store had been burglarized. Yang called his brother, Myung and an employee, Bob. The defendants, uniformed police officers employed by the Chicago Police Department, had already arrived at the store when Yang got there. While Yang and his employee and brother busied themselves with repairing the shattered front display window, Officer Hardin prepared a police report by the front door of the store, adjacent to the broken window. Officer Brown entered the store to investigate. While inside the store looking for a board to repair the window, employee Bob noticed that Officer Brown was perusing the store in the manner of a shoplifter. Bob alerted Yang to this. As Officers Brown and Hardin began to leave, Yang noticed a bulge in Officer Brown's jacket. Believing that Officer Brown had stolen some merchandise, Yang approached the officer and requested that the merchandise be returned. At first, Officer Brown denied that he had taken any merchandise. But after a discussion that escalated into an argument, Officer Brown reached into his jacket and pulled out a pair of "L.A. Raider" shorts and

threw them at Yang. Officers Brown and Hardin then proceeded to enter their police car and drive away. When Yang followed, Officer Brown shoved Yang. Throughout the confrontation, Officer Hardin stood by the passenger door of the squad car. He did not speak or intervene in any manner despite Yang's repeated requests for Officer Hardin to call the police sergeant.

In an attempt to prevent Officer Brown from leaving, Yang held onto the driver's side door of the squad car to keep it open so that Officer Brown could not drive off. However, Officer Brown drove anyway, with the driver's side door ajar and Yang hanging onto the car. Officer Brown drove fast and recklessly in a zigzagging pattern, braking and accelerating, in an attempt to throw Yang off. Officer Brown also repeatedly struck Yang in the ribs with his elbow. Yang asserts that he was unable to let go of the car without being run over. Throughout the drive, Officer Hardin sat in the passenger seat. Officer Hardin did not say anything or in any way attempt to intervene. The squad car traveled, with Yang hanging on more than two full city blocks until two men on the side-walk saw what was happening and ran out to the street to stop the police car. Yang let go when the car stopped. Officer Brown then got out of the car and punched Yang in the face, knocking him to the ground. Meanwhile, Yang's brother, who had run after the squad car, arrived at the scene. Officer Brown knocked Myung Yang to the ground.

Throughout these events, Officer Hardin did not call the sergeant or attempt to stop Officer Brown in any way. However, as the Yang brothers lay in the street, Officer Hardin got out of the passenger seat of the squad car, drew his gun, pointed it at the brothers and shouted obscenities at them. The Yangs froze.

> Officers Hardin and Brown got back in the police car and drove away.

Yang v. Hardin, 37 F.3d 282, 283-84 (7th Cir. 1994) (Bauer, J.).

B. *Proceedings Below*

In January 1992, Mike Yang sued Officers Brown and Hardin, as well as the City of Chicago, for violations of 42 U.S.C. § 1983 and various state common law claims. Both officers defaulted, and the City was dismissed from the action pursuant to *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). The district court found against Officer Brown in the amount of $229,658.10 ($50,000 of which were punitive damages) and dismissed the claims against Officer Hardin. We reversed the district court's decision as to Officer Hardin, finding that Hardin was acting within the scope of his employment for purposes of § 1983 and that he violated Yang's civil rights. *See Yang*, 37 F.3d at 286.

On remand, on February 14, 1995, the district court entered judgment against Hardin in the amount of $185,658.10 for compensatory damages. On May 3, 1995, Yang filed a petition for indemnification and writ of execution, seeking indemnification of the Brown and Hardin judgments (but not both) from the City of Chicago pursuant to 745 ILCS 10/9-102. Section 9-102 directs a municipality to indemnify a tort judgment entered against an employee if the employee's misconduct was within the scope of his employment.

One year later, on May 3, 1996, the district court still had not ruled on Yang's petition for indemnification. On that date, Yang filed a request for status with the clerk of the court under Local Rule 12(Q). When he still had not heard an answer regarding his petition for indemnification on July 12, 1996, Yang filed a second request for status under Local Rule 12(Q). On August 2, 1996, Yang filed

yet another request for status, this time on his petition for attorney's fees, which he had filed and was pending for over seven months without a decision.

On August 1, 1996, some fifteen months after Yang filed his petition for indemnification, the district court issued an order and an opinion, granting Yang's petition for indemnification as to the Hardin judgment, but denying it as to the Brown judgment. Yang subsequently filed an update of his fee petition.

On August 15, 1996, the City filed a motion to reconsider the district court's decision in favor of Yang's petition for indemnification. The court held a hearing on the City's motion on September 4, 1996, and, over Yang's objection, reopened discovery on the scope of employment issue and granted the City leave to file an additional brief in support of its motion to reconsider. The district court also ordered the City to file a response to Yang's fee petition.

The City never conducted any discovery on the scope of employment issue, nor did it file a brief in support of its motion to reconsider, nor file a response to Yang's fee petition. However, at the next hearing before the court, on October 22, 1996, the City did file a motion to dismiss Yang's petition for indemnification, which the court had already granted, for lack of subject matter jurisdiction in light of the Supreme Court's decision in *Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862 (1996). Although the *Peacock* decision had been released in February of 1996, some eight months before the City filed its motion to dismiss, the district court ordered briefing on the City's motion and set a ruling date.

On January 15, 1997, the district court ruled that it lacked subject matter jurisdiction over Yang's petition for indemnification and vacated its previous order granting the petition. The court also denied Yang's fee petition against Hardin, *sua sponte* and over Yang's objection. Judge Grady's sole explanation for denying the fee petition was to avoid getting "charged . . . for reporting pur-

poses" with sitting on the petition for almost two years. On January 17, 1997, the district court entered orders dismissing Yang's § 9-102 petition for indemnification for lack of subject matter jurisdiction, vacating its judgment granting Yang's petition for indemnification, and denying Yang's fee petitions. Yang filed timely notice of appeal on February 6, 1997.

On appeal, Yang argues that the district erred in dismissing his petition for indemnification for want of jurisdiction. He argues that his § 9-102 petition was an ancillary proceeding, not a separate lawsuit, and was properly before the court. Yang also seeks review of the court's dismissal of his fee petition.

ANALYSIS

A. *Subject Matter Jurisdiction*

Yang argues that the district court erred in dismissing his Rule 69 garnishment petition. He asserts that the garnishment proceeding was not a separate lawsuit, as the district court held, but an ancillary proceeding of the same suit. We agree.

We have held that garnishment proceedings to collect a judgment are not separate lawsuits. *See, e.g., Matos v. Richard A. Nellis, Inc.*, 101 F.3d 1193 (7th Cir. 1996) (Rule 69 garnishment proceeding is an ancillary proceeding and district court therefore was within its jurisdiction in allowing plaintiff to collect her judgment from a third party); *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins Co.*, 68 F.3d 1016, 1020 (7th Cir. 1995) ("In federal practice, garnishment to collect a judgment is not—at least, need not be—an independent suit. It is part of the main action, prosecuted under Fed. R. Civ. P. 69 by virtue of the supplemental jurisdiction."); *Vukadinovich v. McCarthy*, 59 F.3d 58, 62 (7th Cir. 1995) ("Garnishment is a standard, and often essential, step in the collection of a judgment, and the party holding the judg-

ment . . . ought to be able to take this step without having to start a new lawsuit in a different court system."); *Argento v. Village of Melrose Park*, 838 F.2d 1483 (7th Cir. 1988) (finding garnishment proceeding to collect judgment from a § 1983 suit within court's ancillary jurisdiction).

We addressed this very question in *Argento v. Village of Melrose Park*. In *Argento*, a man arrested for a traffic accident was severely beaten while in police custody. 838 F.2d at 1486. He filed suit against the four officers who beat him, as well as against the Village of Melrose Park, alleging violations of 42 U.S.C. §§ 1983 and 1985. A jury found the officers not liable under § 1983 for the beating, and we reversed. *Id.* Liability was assessed on remand, but the plaintiff was unable to collect his judgment. He sued the Village to collect the judgment, utilizing Federal Rule of Civil Procedure 69(a) to collect in accordance with 745 ILCS 10/9-102. The Village argued that the district court's jurisdiction did not extend to separate actions against non-parties to the original suit. *Id.* at 1487. We disagreed, finding that the district court had jurisdiction by virtue of its supplemental authority to order a third party not subject to the first suit (the Village) to pay the judgment in the § 1983 suit. *Id.* at 1495. In particular, we found that "the 9-102 claim against the Village . . . [is] adequately related to the initial civil rights action to fall under ancillary jurisdiction." *Id.* at 1490.

The City argues that the rule established in *Argento* and developed through its progeny of case law was overruled by the Supreme Court's opinion in *Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862 (1996).[1] In

[1] The City also argues that Yang's Rule 69 garnishment proceeding is a separate lawsuit because there really isn't a garnishment at issue here since the City is not holding any funds belonging to Hardin and has no obligation under § 9-102 to pay either Brown

Peacock, the Court held that federal courts do not possess ancillary jurisdiction over new actions in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment. 116 S. Ct. at 864. However, the Supreme Court specifically cited Rule 69 as a procedure under ancillary jurisdiction to be used in executing federal judgments in accordance with state procedure and practice. *Id.* at 869 n. 7. Additionally, the Court noted that:

> We have reserved the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments. Without jurisdiction to enforce a judgment entered by a federal court, "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Riggs v. Johnson County*, 6 Wall. 166, 18 L.Ed. 768 (1868). In defining that power, we have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 834 n. 10 (1988) (garnishment). . . .

Peacock, 116 S. Ct. at 868. *See also Vukadinovich v. McCarthy*, 59 F.3d 58, 62 (7th Cir. 1995) (predicting that the Supreme Court would not hold garnishment proceedings to be outside supplemental jurisdiction).

The City's argument that *Argento* does not survive *Peacock* rests on footnote 2 of the Court's opinion, where the Court implied that the *Argento* line of cases were on the wrong side of a circuit split. The City unsuccessfully

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or Hardin any amount. We find this argument to be irrelevant, given our findings below that the City *does* have an obligation to pay Yang's judgment under § 9-102.

argued this same point to us in *Wilson v. City of Chicago*, 120 F.3d 681, 685 (7th Cir. 1997).

In Wilson, the plaintiff brought suit under 42 U.S.C. § 1983 against a Chicago police officer and the City of Chicago, claiming his civil rights were violated when the officer used torture to extract a confession from him. *Id.* at 683. A jury exonerated both defendants, but we reversed as to the officer, and affirmed as to the City. *See* 6 F.3d 1233 (1993). The plaintiff attempted to collect his judgment from the City, pursuant to 745 ILCS 10/9-102. The City argued that there was no federal jurisdiction over plaintiff's claim. *Wilson*, 120 F.3d at 683. We disagreed with the City, and found that "the *Argento* line of cases survives when the plaintiff is proceeding in his original suit rather than by means of a new suit." *Id.* at 685. We therefore reiterate the law of this circuit that a Rule 69 garnishment proceeding to collect a judgment from a third person not party to the original suit is within a court's ancillary jurisdiction, providing "the additional proceeding does not inject so many new issues that it is functionally a separate case." *Id.* at 684.

There is no question here that Yang's Rule 69 petition is not a new suit. As in *Wilson* and *Argento*, the only new issue raised in Yang's second suit is whether Hardin was acting within the scope of his employment when he pulled his gun on Yang. *See Wilson*, 120 F.3d at 684; *Argento*, 838 F.2d at 1493. Yang proceeded against the City under 745 ILCS 10/9-102, an Illinois statute for indemnification that by its terms is applicable only if the employee was acting within the scope of his employment. The City argues that the statute does not apply because Officer Hardin was not acting within the scope of his employment. Even assuming arguendo that Hardin was acting within the scope of his employment, the City maintains that it is exempt from § 9-102 by virtue of the "home rule" provision in the Illinois constitution. The

City raised, and we dismissed, these very arguments in *Wilson*.

When addressing the City's scope of employment arguments in *Wilson*, we stated that "[t]his is not a case in which a police officer, while engaged on police business, commits a wrong designed to advance his purely private interests. . . ." *Wilson*, 120 F.3d at 685. To the contrary, Hardin was on duty, wearing a Chicago police uniform, driving a marked squad car, and investigating a crime when the incident occurred. *See Yang*, 37 F.3d at 284. He failed to intervene when he had a duty to do so.[2] *Id.* In many circumstances it is entirely appropriate for an officer to pull a gun on an individual. Not here. *See also Argento*, 838 F.2d at 1494-95 (finding that a post-arrest beating was within the scope of the officer's employment under § 9-102). Hardin was clearly acting within the scope of his employment when he pulled his gun on Yang.

We similarly reject the City's argument that a city ordinance exempts it from § 9-102 by virtue of the "home rule" provision in the Illinois constitution. "The ordinance, which furnished the basis for [Yang's] impleading the City, provides that when a judgment is rendered against a police officer for personal injury or property damage resulting from the performance of his duty as an officer, the City's corporation counsel 'shall certify such judgment to the city comptroller for payment by the city, when, in his opinion, such member of the police department has not been guilty of wilful misconduct,' Chi. Munic. Code § 2'020(d)." *Wilson*, 120 F.3d at 685-86. As we explained in *Wilson*, "it is irrelevant whether the ordinance is within the City's home rule power" be-

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[2] We note that many of the facts necessary to find that Hardin was acting under color of law are closely related to those necessary to find he was acting within the scope of his employment. *See* Wilson, 120 F.3d at 684.

cause "[r]ead in the light of the statute, the ordinance merely establishes the procedure for complying with the statute. . . . [The City] must pay the victim, and then seek what relief it can against the employee who is responsible for the City's having to pay the victim of the employee's tort." *Id.* at 686. Accordingly, we reverse the decision of the district court and find that Yang's garnishment proceeding was properly within the court's ancillary jurisdiction and that the City is derivatively liable for the judgment against Officer Hardin.

B. *Fee Petition*

Judge Grady waited almost two years before ruling on Yang's fee petition, and then dismissed it without a single reference to its merits. On remand this case shall be assigned to a different judge pursuant to Circuit Rule 36. The next judge assigned to this case should consider and enter an appropriate finding on Yang's fee petition.

CONCLUSION

The district court was incorrect in concluding that it did not have jurisdiction over Yang's garnishment proceeding. A Rule 69 proceeding to collect a judgment is not a separate lawsuit but is within a court's ancillary jurisdiction. Accordingly, we REVERSE the decision of the district court and REMAND for findings consistent with this opinion. We invoke Circuit Rule 36 on remand, with the hope that the matter be disposed of expeditiously. Yang has waited long enough for this lawsuit to come to an end.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number 92 C 54

YANG

v.

BROWN, *et al.*

January 15, 1997

MOTION

a) Defendant.

b) City of Chicago's motion for leave to file its reply in support of its motion to dismiss plaintiff's petition for indemnification & writ of execution for lack of subject matter jurisdiction, instanter.

DOCKET ENTRY

The City of Chicago's motion for leave to file its reply in support of its motion to dismiss plaintiff's petition for indemnification and writ of execution for lack of subject matter jurisdiction, instanter is granted. The City's motion to dismiss plaintiff's petition for indemnification and writ of execution for lack of subject matter jurisdiction is granted and the order dated August 1, 1996, which entered judgment against the City is hereby vacated. [145-1]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 54

MIKE YANG,
Plaintiff,

v.

KENNETH BROWN, *et al.*,
Defendants.

January 15, 1997

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

[2] (The following proceedings were had in open court:)

THE CLERK: 92 C 54, Yang v. Brown, for ruling.
THE COURT: Good morning.
MR. LEE: Good morning, your Honor.
MR. ZINDER: Good morning, your Honor.
MR. LEE: John Lee on behalf of the plaintiff.
MR. ZINDER: David Zinder on behalf of the City.
THE COURT: All right. I am prepared to rule on the City's motion to dismiss plaintiff's petition for indemnification and writ of execution. So if you will be seated, I will give you my ruling.

This matter was pending on the City's motion for reconsideration of my decision that it was liable to indemnify the defendant Hardin for the judgment that has been entered against him in this case. I held that that duty of indemnification arose under the Illinois statute that provides for municipal indemnification in certain circumstances. That statute is 745 ILCS 10/9-102. The City was arguing that the statute did not apply because Hardin was not in the scope of his employment or acting in the scope of his employment when he committed the acts which rendered him liable in this case. And a requirement of Section 9-102 is that the employee be acting in the scope of his or her employment.

While the motion for reconsideration was pending, the Supreme Court of the United States decided the case of Peacock [3] v. Thomas, 116 Supreme Court 862, on February 21, 1996. Based on that decision and other arguments allied with the holding in Peacock, the City now asserts that this Court lacks subject matter jurisdiction over the indemnification action or indemnification claim of the plaintiff Yang.

The Peacock case involved an effort of a plaintiff in an ERISA action who had recovered a judgment against a defendant to pursue another party whom plaintiff alleged should be held responsible for the judgment. Plaintiff had been unsuccessful in collecting the judgment from the defendant against whom the judgment had been rendered. The Supreme Court held that the trial Court had lacked subject matter jurisdiction over this additional defendant on the supplemental claim to hold that defendant Peacock liable for the judgment.

It is the basis of the Court's ruling that is the subject of the memoranda that the parties in this case have filed recently. They interpret the Peacock case differently, and this is understandable not only in terms of their different positions in this lawsuit, but because the application of the facts in Peacock to the facts in this case is not alto-

gether clear. The Supreme Court in Peacock did acknowledge that it has been traditional for federal Courts to exercise as part of their federal jurisdiction the authority to utilize various state law supplementary procedures for the collection of judgments.

[4] The Court pointed out at page 868 of 116 Supreme Court that it had, "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third partics to assist in the protection and enforcement of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances."

The Court went on, however, on the same page, to say the following:

"Our recognition of these supplementary proceedings has not, however, extended beyond attempts to execute or to guarantee eventual executability of a federal judgment. We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment."

Then they point out that they rejected that very attempt in an earlier case.

The Court went on to say at page 869:

"This action is founded not only upon different facts than the ERISA suit, but also upon entirely new theories of liability. In this suit, Thomas' alleged civil conspiracy and fraudulent transfer of Tru-Tech's assets but, as we have noted, no substantive ERISA violation."

"The alleged wrongdoing in this case occurred after the ERISA judgment was entered, and Thomas' claims—civil [5] conspiracy, fraudulent conveyance, and 'veil piercing'—all involved new theories of liability not asserted in the ERISA suit."

Now, was the liability of the City under Section 9-102 asserted in this case prior to the entry of judgment? Obviously not. The City was sued on the same basis as

Hardin; namely, alleged liability under Section 1983 of the Civil Rights Act. This Court dismissed the City under the Monell Doctrine, and that became a final judgment from which no appeal was taken.

The liability asserted against the City for the Hardin judgment arises, if at all, under a theory that is brand new in the case and which has no independent federal jurisdictional basis. The question is whether Section 9-102 can be regarded as analogous to the garnishments and attachments that the Supreme Court recognized as proper in Peacock.

I think there is a basic difference between a garnishment or attachment taken out against a third party, on the one hand, and the effort to hold the City liable under Section 9-102 that is attempted here. The garnishment respondent, or garnishee, or the person who might be made subject to an attachment, is allegedly holding funds that already belong to the judgment debtor.

That is the theory of those particular proceedings. There is no effort in those proceedings to start from the [6] ground up and establish that the third party is, in fact, liable to the judgment debtor; rather, the usual garnishment seeks to apply the judgment debtor's bank account held by a bank to the judgment.. An attachment against a third party might involve the judgment debtor's automobile or boat or some other item of personal property belonging to the judgment debtor, which is an appropriate subject of execution on the judgment.

I doubt that in those kinds of actions it would be appropriate for any Court, not just a federal court, but for any Court to undertake a ground-up determination as to whether title to the bank account is, in fact, in the judgment—or entitlement to the bank account is, in fact, in the judgment debtor or entitlement to the boat is in the judgment debtor as opposed to possible adverse claimants, including the attachment defendant.

Let's assume, for instance, that Hardin in this case had done some work for a contractor and has a claim against

that contractor for wages that he was not paid. The contractor either denies that the work was done or denies that it was done properly or claims that, in fact, he had paid. I have doubt whether even in a state law garnishment action it would be appropriate for the judgment creditor to attempt to resolve those basic factual disputes that exist between the judgment debtor and the garnishee. [7] But be that as it may, I read Peacock to mean that to the extent that there are factual determinations that have to be made having to do with liability that are based on a theory other than the one involved in the determination of liability against the judgment debtor, and if those liability determinations do not invoke federal law as opposed to state law, then the federal court lacks subject matter jurisdiction over the action against the third party.

The Illinois Supreme Court has recently decided a case, which has been called to our attention by the City, that has some bearing upon what is necessary to establish the liability of the City to indemnify Hardin for the judgment that has been entered against him. That is the Wright case. I don't have the citation here.

The Illinois Supreme Court indicated that criminal behavior is not to be considered to have been within the scope of the employee's employment within the meaning of a municipal indemnification provision. In that case, the Court was dealing with a municipal indemnification provision other than the City of Chicago provision. But it was the same law, the same analysis that was involved. Now, that is a different view of scope of employment than this Court had previously adopted in this case.

Now, the City takes the position that even before the Wright decision, there was a factual dispute as to whether [8] Hardin was in the scope of his employment. Now, in light of Wright, it may well be that there no longer is even a factual dispute that could be resolved in favor of the plaintiff inasmuch as Hardin, as I understand it, was convicted of a criminal offense in connection with the conduct complained of by plaintiff in this case.

So it may be that, in light of Wright, my decision that the City is liable under Section 9-102 should be reconsidered. However, I do not reach that question because the City based on Peacock raises the more fundamental question as to whether I have subject matter jurisdiction even to entertain the claim for indemnification.

There is another case that is very important because it is a Seventh Circuit application of Peacock. The parties differ in their interpretation of Central States v. Central Transport, Incorporated, 85 F.3d 1282, decided by the Seventh Circuit on June 7, 1996, just as they differ in their interpretations of Peacock. What is important about Central States is what the Court said about Peacock and what it held in regard to subject matter jurisdiction in the case before it.

The Court held that there was federal subject matter jurisdiction because, unlike Peacock, the claim against the third party, if you will, arose under ERISA. There was, in other words, independent federal jurisdiction to support the imposition of liability upon the defendant against whom the [9] previous judgment had not been entered.

Now, the plaintiff Central States was seeking to impose liability on a defendant it claimed had actually dominated and controlled the original defendant such that it was the true employer for purposes of ERISA liability. Here is what the Court said about that at page 1286. The Court distinguished the Central States position from Peacock as follows:

"Central States, however, has styled its theory of liability somewhat differently;" that is, somewhat differently than Thomas had in the Peacock case, "alleging that Central Transport and Central Cartage so dominated and controlled the Rogers Group Companies that they were the 'true employers' for purposes of ERISA liability."

"Under this theory, Central States is not pursuing the defendant corporations merely to enforce a judgment; rather, Central States is claiming that Central Transport and Central Cartage played a part in the initial ERISA

violation. This theory is different from Peacock's where Thomas pursued Peacock solely in his capacity as an officer and shareholder of the liable corporation. Thomas' lawsuit attempted to 'pierce the corporate veil.' By contrast, Central States claims that the defendants exercised 'common control.' The former can be characterized more generically as a suit to enforce a judgment while the latter is a specific claim for relief under ERISA."

[10] I find that explanation helpful in understanding Peacock and understanding the likely application of Peacock to the facts before us. Clearly, for Yang to prevail against the City, he has to show different and new facts that were not required for him to prevail against Hardin. What he had to show against Hardin was that Hardin acted under color of law pursuant to Section 1983. What he has to show against the City is that Hardin acted within the scope of his employment, which is a very different thing from color of law.

It seems to me, therefore, that under the Peacock case, this Court lacks subject matter jurisdiction over plaintiff's indemnification claim against the City. I recognize that there are two sides to this argument, and certainly I recognize that I will not be the last word on this matter. All I can do is do the best I can to apply the law as I understand it, and that is what I have attempted to do here today.

I am going to vacate the order of August 1, 1996, which entered judgment against the City, and I am going to grant the City's motion to dismiss plaintiff's petition for indemnification and writ of execution for lack of subject matter jurisdiction.

Now, let me take up some other matters. There is a petition for attorney's fees pending. I guess there are really two petitions, one for work done during one phase of the case [11] and another for fees on appeal.

Those are fully briefed, are they?

MR. ZINDER: The petition for attorney's fees with respect to the City is based on the Court's ruling on the

writ of execution, and I believe that that would be moot as a result of this Court's ruling today.

THE COURT: I understand it is moot, but what about—

MR. ZINDER: The City.

THE COURT: It is moot as to the City now.

MR. ZINDER: Right.

THE COURT: But did the City ever file a brief in opposition to the motion for fees based on the—

MR. ZINDER: The City did not, and I was prepared to file something today indicating—objecting to the request for fees.

THE COURT: You say—

MR. ZINDER: Objecting to the request for fees.

THE COURT: Well, inasmuch as the request is moot as to the City, I guess you don't have to do that now.

MR. ZINDER: Right.

THE COURT: Now, let me ask Mr. Lee: I assume that there is going to be an appeal from today's order conceivably, —not only conceivably; I suppose very possibly there will be a reversal and the case will be back here at some time in the future, at which time I will have to confront the question for [12] attorney's fees.

So my question is what is the best way to handle it. I don't want to do unnecessary work. On the other hand, that fee petition is gathering dust.

MR. LEE: I don't believe the appellate jurisdiction will be affected merely because of the fee petition pending in the district court.

THE COURT: No, I think that is a separate matter.

MR. LEE: Right. I really could care less whether you decide now or hold off until whenever.

THE COURT: What if I did this. Well, let me ask you this. Do you want to proceed against Hardin and Brown for fees if you don't have a right of indemnification against the City? In other words, would that be worth your while?

MR. LEE: I will have to ask my client. Now, on Brown's fees, you have already ruled. You gave us judg-

ıment against Brown, and you have already ruled on the petition.

THE COURT: So the only fees are against Hardin.

MR. LEE: Hardin, right.

I have no idea whether those people have assets or not. And I really can't answer that question at this point.

THE COURT: I wonder if I could do this: Deny the fee petitions at this time or deny the fee petition against Hardin at this time without prejudice to renewing it in the event of a reversal of today's order because, if that order is reversed, I [13] will want to hear from the City as to the merits of the fee petition, the amount requested and the time spent, and so on. I would give them an opportunity to do that.

So it might make sense to wait and see what happens on appeal before I take action on the fee petition. Now, the reason I don't want to just let it sit there while the appeal is pending is that it is an old motion that I get charged with for reporting purposes. Our lives are governed by these bureaucratic statistical requirements. So that is what I am inclined to do. But it is definitely without prejudice to reviving it and having me decide it whether you go only against Hardin or against the City.

But since you don't even know whether you want to go against Hardin at this point, whether it would be worthwhile to, and you can't go against the City at this point, it doesn't seem to me to make sense for me to spend the time that would be necessary to determine the amount of fees that you are entitled to from Hardin.

So that is what I am going to do, and I don't see how Yang can be hurt by that.

MR. LEE: For the record, the Court will do what it will do. I am not agreeing to it.

THE COURT: Right. No, I am not asking you to. I am just telling you what I am going to do. I assure you absolutely that you will not be prejudiced by it because I will [14] just simply reinstate it at your request if you want to go against Hardin alone and automatically if there is a reversal of today's order.

There is another motion, Mr. Zinder.

MR. ZINDER: I believe, your Honor, there are two motions. One was for leave to file the reply brief instanter, and the other one was for leave to subpoena certain grand jury proceedings.

THE COURT: Right. Should we just withdraw that?

MR. ZINDER: In light of the Court's ruling, the City withdraws the motion for leave to request certain grand jury proceedings.

THE COURT: All right, that motion will be withdrawn.

Here is the reply.

(Brief interruption.)

THE COURT: I think we have an extra copy of your brief. Do you want to take that back? You might have some use for it because I have got a judge's copy. We have got the original. I don't need two extra copies.

MR. ZINDER: Your Honor, in light of the Court's ruling, can I assume that the motion for leave to file the reply brief instanter is granted?

THE COURT: That is granted as well, yes.

MR. ZINDER: Thank you.

THE COURT: There is a motion to alter judgment filed [15] back in August. That is what I referred to as a motion for reconsideration?

MR. ZINDER: Right, yes, that is correct, your Honor. That is the City's motion to amend or alter judgment or reconsider what was filed back in August.

THE COURT: Okay.

MR. ZINDER: I assume that you are denying that.

THE COURT: Let's refer to that by its full title. That was granted.

MR. ZINDER: I assume that you are denying that as being moot.

THE COURT: No, I am granting that because I am setting aside the judgment.

MR. ZINDER: Okay.

MR. LEE: Technically, Judge, there is no subject matter jurisdiction.

You are granting on the merits of a motion to reconsider on the scope of employment issue.

THE COURT: Oh, that was the—

That is right.

MR. LEE: I don't think you could reach that question because you just said you have no subject matter jurisdiction.

THE COURT: But I have to vacate the judgment—

MR. LEE: Sure.

[16] THE COURT: —because there is a judgment.

All right. But you are correct, I will vacate the judgment, but I will deny the motion to alter and amend—

MR. ZINDER: As being moot.

MR. LEE: As being moot.

THE COURT: —as being moot in light of the Court's lack of subject matter jurisdiction. Yes, you are quite correct.

All right, thank you very much.

MR. LEE: Thank you, Judge.

THE COURT: Yes.

MR. ZINDER: Your Honor, one additional thing.

Does your Honor intend to publish any—

THE COURT: No, I do not, no.

MR. LEE: At some point there will be a published opinion.

MR. ZINDER: Right, I understand that, because I think this is the first issue.

THE COURT: The Court of Appeals opinion is going to be the one that counts.

MR. ZINDER: Thank you very much, your Honor.

Your Honor, on behalf of the City, I do apologize for any inconvenience to the Court with respect to the delay on the City's reply brief and the motion to dismiss.

MR. LEE: On behalf of Mike Yang, I will never mess [17] with City Hall again after this is over.

(Which were all the proceedings had in the above entitled cause on the day and date aforesaid.)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

June 9, 1998

HON. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

Nos. 97-1288, 97-1418

MIKE YANG,
Plaintiff-Appellant,

v.

CITY OF CHICAGO,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 54—*John F. Grady*, Judge

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by defendant-appellee and the answer thereto filed by plaintiff-appellant, all of the judges on the original panel voted to deny and none of the judges in active service has requested a vote thereon.*

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

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* The Honorable Joel M. Flaum took no part in the consideration of the suggestion for rehearing en banc.